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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-635

UNITED STATES OF AMERICA, *Petitioner,*

VS.

ROSE WONG, *Respondent.*

BRIEF FOR RESPONDENT

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UNITED STATES OF AMERICA, *Petitioner,*

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether a "putative" defendant called as a grand jury witness is entitled to have her testimony suppressed in a perjury prosecution on the ground that she was not effectively informed of her privilege against self-incrimination.

STATEMENT

Rose Wong, a native of China, completed eight grades of elementary education at Commodore Stockton School in San Francisco. She married a non-English speaking husband, and conversed at home

with him in Chinese, as she did, with few exceptions, with their San Francisco born daughter (Tr. 73-75).[1]

She was subpoenaed to appear before a grand jury in the Northern District of California investigating illegal gambling businesses and the obstruction of state and local law enforcement. Before her appearance, the same grand jury had heard testimony from two San Francisco police officers acting as undercover agents for the Federal Bureau of Investigation that Mrs. Wong had paid them bribes in order that she might carry on a gambling establishment in Chinatown without police interference. (Tr. 92-93).

Mrs. Wong appeared without an attorney, and without having consulted one (App. 3). She was not questioned by the prosecutor about her need for an interpreter, and was instructed and testified without one. The questions she was asked before the grand jury dealt specifically with the alleged illegal activities on her part, and if answered affirmatively would clearly have incriminated her. She was subsequently indicted for perjury.

After her indictment, she moved to suppress her testimony before the grand jury on the ground that her limited comprehension of English had prevented her from understanding the prosecutor's attempted explanation of her privilege under the Fifth Amendment not to incriminate herself.

At the hearing on the motion before the district court, Mrs. Wong testified with the assistance of an

[1] "Tr." refers to the transcript of the hearing in the district court on Mrs. Wong's motion to suppress her grand jury testimony.

interpreter. The prosecutor testified as did Dr. William S.Y. Wang, Professor of Linguistics at the University of California, Director of its Phonology Laboratory and Editor of the Journal of Chinese Linguistics. Dr. Wang testified as an expert in evaluating the nature and extent of Mrs. Wong's understanding of and proficiency in the English language. It was his opinion that Mrs. Wong did not understand the prosecutor's explanation that the Fifth Amendment gave her the right to refuse to answer any question that might tend to incriminate her, even though she indicated that she did understand.[2]

Mrs. Wong, in addition to testifying that she did not understand the explanation of the prosecutor concerning the Fifth Amendment, made it clear that she thought that she had to answer each question.[3]

The district court granted the motion to suppress, and made the following findings which have not been challenged by the government:

[2] "THE COURT: In the previous question before that we have the equivalent of eleven lines and we have an answer, 'uh-huh' [The question referred to is the question which begins an App. 2 and concludes on App. 3].
THE WITNESS: Yes.
THE COURT: Now, do you draw any conclusion from that?
THE WITNESS: The conclusion that I would draw is that she feels that she had to respond, and not responding, she would lose face, and responding any which way would get her off the hook.
THE COURT: And is it this question of not responding and losing face that prompts you to conclude that she really didn't understand the Fifth Amendment question and yet answered 'Yes'?
THE WITNESS: That plus the other facts that we have been talking about" (Tr. 63).

[3] "Q. Did you feel that you had to answer each question?
A. That's what I thought" (Tr. 87).

1. Rose Wong was a "putative" defendant (App. 12-13);
2. She did not understand the prosecutor's explanation of the privilege against self-incrimination (App. 12).

On the government's appeal, the court of appeals affirmed the suppression order. It upheld the findings of the district court that the government's attempt to inform Mrs. Wong of her privilege against self-incrimination was not effective, because not understood (Pet. App. 5a). The case is here, then, in the same posture as it would be if Mrs. Wong had received no Fifth Amendment advice at all. The government makes its argument from that premises and we shall do the same.

SUMMARY OF ARGUMENT

A "putative" defendant subpoenaed to testify before a federal grand jury must be effectively informed of his privilege against self-incrimination under the Fifth Amendment, or he may thereafter have the testimony he gives suppressed as a violation both of his privilege against self-incrimination and his right to due process under the Fifth Amendment.

1. All three opinions in *U.S. v. Mandujano,* No. 74-754, decided May 19, 1976, agree that the testimony of a grand jury "putative" defendant witness who

has been effectively informed of his privilege against self-incrimination may not be suppressed in a perjury prosecution.

What *Mandujano* left open and what must be decided here is the effect of a failure effectively to advise a "putative" defendant grand jury witness of the privilege against self-incrimination.

A. Such effective advice must be given if the protection against compulsory self-incrimination is to remain meaningful before Federal grand juries. "Putative" defendants called before grand juries are in as great need to be informed of their privilege under the Fifth Amendment to refrain from answering incriminating questions as in-custody suspects are in need of complete *Miranda* warnings. The absence of such advice to grand jury "putative" defendant witnesses poses the same threat to the adversary system favored by the privilege as the absence of *Miranda* warnings to in-custody suspects. There is no distinction between a "putative" defendant who is in custody, and a "putative" defendant called before a grand jury, but with respect to compulsion to incriminate it is one of degree and not of character. The compulsion inherent in custodial interrogation requires extended warnings to preserve Fifth Amendment values; the compulsion inherent in a grand jury setting can be overcome by not less than effective advice concerning the privilege to decline to answer incriminatory questions.

B. When the prosecutor fails to give effective advice concerning the Fifth Amendment privilege, the

remedy available to the "putative" defendant witness must be suppression of his grand jury testimony in any prosecution which follows such testimony. Any other course would impermissibly dilute the privilege against self-incrimination. Specifically, this requires the suppression of such compelled testimony whether the indictment which follows it is for a substantive offense or for perjury. The doctrine that the Fifth Amendment does not constitute a license to commit perjury is not to the contrary.

2. A failure effectively to inform a grand jury "putative" defendant witness of his privilege against self-incrimination is also a violation of due process which compels the suppression of his grand jury testimony.

Where answers are induced by procedures which are inherently unfair, they are a product of a violation of due process, and must be suppressed. To call a "putative" defendant before the grand jury and fail effectively to inform him of his privilege to decline to answer incriminating questions, and then to ask him incriminating questions, is an inherently unfair procedure. It compels the witness either to incriminate himself or to perjure himself, when he could have declined to answer entirely had he been aware of the privilege. Thus, while it is the existence of the Fifth Amendment privilege which makes the dilemma confronting the uninformed witness unfair, it is the due process clause of the Fifth Amendment which prohibits subjecting the witness to such an unfair procedure.

ARGUMENT

I

A "PUTATIVE" DEFENDANT SUBPOENAED TO TESTIFY BEFORE A FEDERAL GRAND JURY MUST BE EFFECTIVELY INFORMED OF HIS PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION OR HE MAY THEREAFTER HAVE ANY TESTIMONY HE GIVES SUPPRESSED AS A VIOLATION OF HIS PRIVILEGE.

This case comes before this Court, in the light of the findings of the district court, as if Mrs. Wong had not been advised by the prosecutor of her privilege against self-incrimination under the Fifth Amendment. The initial inquiry that must be made, therefore, is whether such advice by the prosecutor is mandated by the Constitution or other requirements of law.

A. A "Putative" Defendant Subpoenaed by a Grand Jury Must be Effectively Advised by the Prosecutor of His Privilege Against Compulsory Self-Incrimination.

As was observed in the plurality opinion in *U.S. v. Mandujano,* No. 74-754, decided May 19, 1976: ". . . Federal prosecutors apparently make it a practice to inform a witness of the privilege before questioning begins." 44 USLW 4635, f.n.7 "[I]t is common practice for government attorneys to advise grand jury witnesses who are suspected of involvement in the criminal activity under investigation of their privilege against self-incrimination . . ." Brief for the United States, p. 19, *U.S. v. Washington,* No. 74-1106, October Term, 1976.[4] Yet the government insists that

[4]Apparently, no such advice is commonly given to grand jury witnesses who are not "putative" defendants.

such advice is not required by the Fifth Amendment. By what warrant and for what reasons does the government give such advice? These questions remain unanswered in its analysis of the problem.

The simple truth is that a grand jury "putative" defendant witness confronted with questions the answers to which could incriminate him does not have a "free choice to admit, to deny, or to refuse to answer" *(Lisenba v. California,* 314 U.S. 219. 241), unless he is aware of his privilege against self-incrimination and can claim it. "Absent a claim of the privilege, the duty to give testimony remains absolute" *(U.S. v. Mandujano,* 44 USLW, at 4633). It is in this sense that a grand jury interrogation of a "putative" defendant approximates the inherent coerciveness of custodial interrogation by the police, despite the marked other distinctions between the two processes. The insights expressed in *Garner v. U.S.* No. 74-100, 44 USLW 4323, concerning the need for *Miranda* warnings in custodial interrogations make manifest the need for advice concerning the privilege to a "putative" defendant called by a grand jury. "It is presumed that without proper safeguards the circumstances of custodial interrogation deny an individual the ability freely to choose to remain silent. . . . At the same time, the inquiring government is acutely aware of the potentially incriminatory nature of the disclosures sought. Thus, any pressures inherent in custodial interrogations are compulsions to incriminate, not merely compulsions to make unprivileged disclosures. Because of the danger that custodial interrogations posed to the adversary system favored by the privilege, the Court in *Miranda* was impelled to adopt the extraordinary safeguard of excluding statements made without a knowing and intelligent waiver of the privilege," 44 USLW, at 4326.

When Rose Wong was confronted in the grand jury with questions concerning whether she had bribed police officers, she had no ability to freely choose to remain silent. She could do so only if she claimed her privilege against self-incrimination, a privilege of which she was unaware.[5] When she was asked the questions, the government prosecutor was acutely aware of the potentially incriminatory nature of the disclosures sought. Without advice to her of her right to claim the privilege, her questioning became inquisitorial, and made a mockery of the adversary system favored by the privilege.

The government urges upon this Court a view of the Fifth Amendment which is simplistic, unrealistic, and unwise. Unless the setting is one in which the full panoply of *Miranda* warnings are required, says the government, then none need be given. Yet all that is sought here is a Constitutional requirement that squares the availability of the privilege to a witness before a grand jury *(Counselman v. Hitchcock,* 142 U.S. 547) with the circumstances when it is most needed to preserve our adversary system, namely when a witness that the prosecutor is making a case

[5]She testified at the suppression hearing that she thought that she had to answer every question (Tr. 87).

against is asked potentially incriminating questions. Holding that the Constitution requires that such a witness be advised of his privilege before testifying will interfere not at all with the grand jury's functioning, nor with the ability of those potential defendants who want to implicate themselves to do so. It will make the privilege a reality to the untutored and the ignorant, as well as to those who are adequately counseled. And it will require no more than the government already is doing.

Finally, it will formalize the distinction between those situations requiring *Miranda* and those merely requiring advice concerning the Fifth Amendment privilege, a distinction which was implicit in this Court's holding in *Beckwith v. U.S.*, No. 74-1243, 44 USLW 4499.[6] The mechanism for the protection of constitutional rights must be fashioned by the setting in which they are threatened. *Michigan v. Mosley*, 44 USLW 4015, 4016. When the setting is as pervasively coercive as custodial interrogation, the full array of warnings mandated by *Miranda* is required. When the threat is limited to a specific practice of prosecutors which improperly deprives "putative" defendants of choice unless they are informed of their privilege against self-incrimination, then the simple remedy is to advise them of the privilege before they are interrogated. Such advice further protects Fifth

[6]In *Beckwith*, the holding was that statements made in a non-custodial interrogation by Internal Revenue Service agents were admissible despite the absence of *Miranda* warnings, but the defendant had been effectively advised of his privilege against self-incrimination. Mr. Justice Marshall concurred in the judgment.

Amendment values by preventing self-incriminating disclosures through ignorance.[7]

For the foregoing reasons, the Court should rule that Fifth Amendment privilege against self-incrimination requires that a "putative" defendant grand jury witness be effectively advised of its existence before he is interrogated.[8]

B. The failure to advise a "Putative" Defendant of His Privilege Against Self-Incrimination Requires Suppression of His Grand Jury Testimony for use in any Prosecution which Follows His Appearance, Including One for Perjury.

The ordinary and usual remedy for correcting Constitutional violations which have resulted in improperly compelled testimony, statements or other evidence is to suppress their use to prove the offense in any subsequent prosecutions.[9] *Smith v. Katzenbach*, 351 F. 2d 810, 815 (D. Col. 1965).

This ordinary and usual remedy is not available to Rose Wong in this case, argues the government. Allegedly perjurious testimony, as opposed to self-incriminating testimony, may not be suppressed because the Fifth Amendment privilege against self-

[7]"In addition, the rule that a witness must claim the privilege is consistent with the fundamental purpose of the Fifth Amendment—the preservation of an adversary system of criminal justice. See *Tehan v. Shott*, 382 U.S. 406, 415 (1966). That system is undermined when a government deliberately seeks to avoid the burdens of independent investigations by compelling self-incriminating disclosures." *Garner v. U.S.*, 44 USLW, at 4326.

[8]Of course, this Court could prescribe such a requirement in the exercise of its "supervisory powers". *McNabb v. U.S.*, 318 U.S. 332 (1943).

[9]An alternative remedy is to exclude their receipt in evidence to prove the offense during the trial. *E.g., Wong Sun v. U.S.*, 371 U.S. 471 (1963).

incrimination provides no protection for the commission of perjury. We shall show that this principle, based on what the government calls the *Knox-Bryson-Glickstein* line of authority[10] has no application to this case, and that the vindication of the Fifth Amendment privilege which was violated in this case requires the suppression of Rose Wong's testimony.

Two principles emerge from the *Knox-Bryson-Glickstein* line of decisions. The first is that one who has committed perjury may not challenge the right of the government to *ask* the question which was answered perjuriously. *Bryson v. U.S.,* 396 U.S. 64.

The other is that even though the Fifth Amendment would have permitted an informed witness to decline to answer the question in the first instance, it does not shield one who nevertheless answers from a prosecution for perjury. *U.S. v. Knox,* 396 U.S. 77; *Mackey v. U.S.,* 401 U.S. 667.

Glickstein v. U.S., 222 U.S. 139, stood for neither proposition[11] but enunciated the famous dictum that the Fifth Amendment does not endow the person who testifies with a license to commit perjury.

All of these cases dealt with a witness or defendant who was fully aware of his privilege against self-incrimination. None of them, or others relying on their authority, dealt with the precise situation we have here, namely, an answer which is the product of

[10] *U.S. v. Knox,* 396 U.S. 77; *Bryson v. U.S.,* 396 U.S. 64; *Glickstein v. U.S.,* 222 U.S. 139.

[11] *Glickstein* held that a grant of immunity in the Bankruptcy Act did not include immunity from prosecution for perjury.

ignorance of the Fifth Amendment privilege. Had Rose Wong known of her privilege against self-incrimination when she was before the grand jury can there be any doubt that she would have remained silent under a claim of privilege and that the answers which are the subject of her indictment for perjury would never have been given?

There is a vital distinction between a witness with knowledge of the privilege and one ignorant thereof. When the former answers questions to which the privilege is applicable, he does so voluntarily.[12] When the latter does so, his answers are involuntary, i.e., without the freedom to decline to answer. In this sense, any testimony of an ignorant witness which could have been withheld by the privilege is "compelled" in violation of the Fifth Amendment.

This brings us to the critical juncture. Where the involuntary answer is self-incriminatory and is followed by an indictment for a substantive offense, it clearly is admissible or may be suppressed. *Garrity v. New Jersey,* 385 U.S. 493; *U.S. v. Blue,* 384 U.S. 251. According to the government, where the compelled answer leads to an indictment for perjury, it should not be suppressed, according to the teaching of decided cases.

We have demonstrated that the *Knox-Bryson-Glickstein* line of authority dealt with and hence

[12] "The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *U.S. v. Monia,* 317 U.S. 424, 427 (1943).

applies only to voluntary answers, and not involuntary ones induced by ignorance. The question in the present context has, to our knowledge, never been decided by this Court. Unlike *Mandujano,* who "was free at every stage to interpose his constitutional privilege against self-incrimination" (44 USLW at 4635-4636) because he was aware of it, Rose Wong could not do so because she was ignorant thereof.

It is submitted that the testimony of Rose Wong which is the subject of her indictment should be suppressed because it was not a product of free choice on her part, and the vindication of the Constitutional privilege commands no less. The rule we seek is a narrow one. Only that testimony should be suppressed which could have been avoided by the claim of privilege. Only the testimony of the "putative" defendant witness ignorant of his privilege should be suppressed.

It is true that "[i]n this constitutional process of securing a witness' testimony, perjury simply has no place whatever." (*U.S. v. Mandujano,* 44 USLW 4629 at 4633) But if the process itself violates the Constitution, should not the Constitution prevail over the possibility that the perjury may not be punished. And the recognition that perjury itself must be willful *(U.S. v. Knox,* 396 U.S. 77, 83) makes it evident that under the narrow circumstances present here the suppression of testimony claimed to be perjurious would not denigrate the sanctity of the oath. An involuntary answer secured by a violation of the Constitution even if the answer is untrue is not "an

obvious and flagrant affront to the basic concepts of judicial proceedings." *U.S. v. Mandujano,* 44 USLW, at 4633.

For these reasons, the rulings below suppressing the grand jury testimony must be upheld, even though the indictment was for perjury. Suppressing the testimony of Rose Wong upon which her indictment was based resulted simply in restoring the record before the grand jury to the condition that would have obtained had she been aware of her rights.

II

A FAILURE EFFECTIVELY TO INFORM A GRAND JURY "PUTATIVE" DEFENDANT WITNESS OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION IS A VIOLATION OF DUE PROCESS WHICH COMPELS THE SUPPRESSION OF HIS TESTIMONY.

The court of appeals below found that "the procedure employed by the government was fraught with the danger, if indeed not intended, of placing appellee in the position of either perjuring or incriminating herself." This predicament violates "the sense of fair play—which is the essence of due process." *Galvan v. Press,* 347 U.S. 522, 530 (1954).

The particular facts of this case fill out the "vague contours" of due process. *Rochin v. California,* 342 U.S. 165, 170 (1952).

Mrs. Wong was not merely a witness called before a grand jury seeking information. That grand jury had, before she appeared, already heard testimony

that Mrs. Wong had offered bribes. The district court said, "How can you get a better defendant target than Mrs. Wong? She's ideally a defendant target. And she was, and she was brought in. And I must conclude that was the reason she was brought in" (App. 14).

Next, the district court found she did not understand the "questions related to constitutional rights which she would appear to be entitled to understand." (App. 12). Thus, unlike *Mandujano* the warnings volunteered by the prosecutor were not sufficient to inform her of her rights. 44 USLW 4634. And unlike Mr. Mandujano Mrs. Wong was never "free at [any] stage to interpose [her] constitutional privilege against self incrimination." 44 USLW 4635-4636.

In the posture of this case Mrs. Wong had no choice. Either her answers would incriminate her, or they would subject her to a perjury prosecution as being inconsistent with what the grand jury had already heard. This is an example "of the very evils sought to be prevented by the enshrinement of the Fifth Amendment privilege in the Constitution." Brennan, J., in *U.S. v. Mandujano,* 44 USLW at 3640. Failure to effectively advise Mrs. Wong of her privilege against self-incrimination was a violation of due process.

Nor should the legitimate investigatory function of the grand jury obscure the real nature of Mrs. Wong's situation. "We cannot ignore the obvious fact that while a few witnesses placed in such a position might honestly wish to confess, in the great majority of

cases asking incriminating questions of a putative defendant, were the witness fully informed of his rights, would be an idle task, as the witness would remain silent. The utility of the procedure to the government, and its inherent unfairness and danger, lies in the wholly predictable fact that the witness will be ignorant of or not understand the right to remain silent and be compelled by answering to subject himself to criminal liability" (Court of Appeals).

"[O]ur system of law has always endeavored to prevent even the probability of unfairness" *In re Murchison,* 349 U.S. 133, 136 (1955). For Mrs. Wong that probability became a certainty.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below be affirmed.

Dated, October 11, 1976.

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